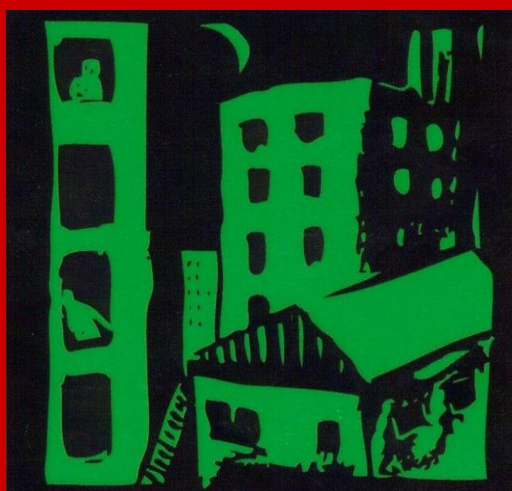
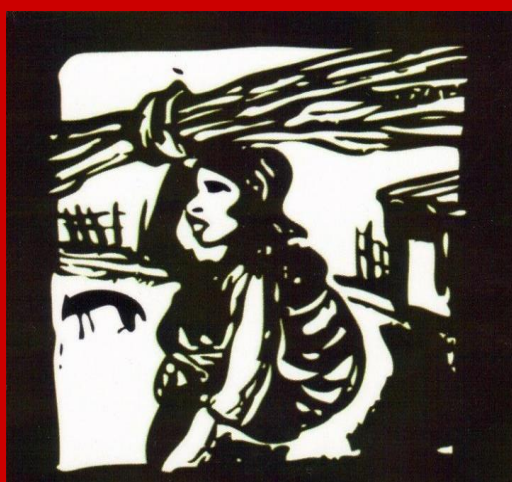


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South African municipalities in financial distress: what can be done?

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ABSTRACT

South African municipalities have been faced with financial distress for some years. In some municipalities, financial distress has intensified to the extent that local government faces a "collapse". On the other hand, many municipalities have been in reasonably good financial shape, at least until the recent pandemic. The information National Treasury publishes

can help to identify cases of real concern. The primary responsibility to address municipal financial problems lies with the municipality, but other parties also have a role to play. Financial problems have different causes and will differ in severity. Consequently, different tools are appropriate, depending on the cause, severity and aggrieved party. These tools include discretionary and mandatory financial recovery plans, debt relief and restructuring. Where a municipal financial crisis amounts to a disaster, further tools can come into play. We hope that this exploration of legal remedies will stimulate greater action to resolve financial problems in municipalities. This article addresses situations where a municipality is already faced with financial distress, and does not delve into measures aimed at preventing municipal financial distress.¹

Keywords: Municipality, financial crisis, local government, intervention, financial recovery, financial disaster, South Africa, financial problem.

1 INTRODUCTION

Since the dawn of the democratic era, some South African municipalities have experienced financial distress.² In recent years, these financial failures have received more attention from provincial governments, from national government, and from the press. Some recent events helped focus attention on financial management problems in municipalities: 1) the 2018 collapse of VBS Bank, which resulted in significant losses to municipalities which had invested (in violation of the applicable regulations) in the mutual bank; 2) the record number of service delivery protests (237 of which took place in 2018 and 218 in 2019);³ and 3) unfavourable reports from the Auditor - General, indicating that fruitless and wasteful expenditure cost municipalities R2,07 billion in the 2018/19 financial year.⁴ The research question that this article aims to answer is : what

¹ This research was conducted with the financial support of the National Research Foundation of South Africa (NRF) (Grant No 115581). All viewpoints and errors are the authors' own. The authors wish to extend their gratitude to Professor Klaus Beiter, Professor Anél du Plessis, Dr Caiphas Soyapi and Ms Rolien Roos for their comments on earlier versions of this article

² Wandrag R "The quest for financial discipline at local government level: the regulation of municipal borrowing and financial emergencies" 2003 *Law, Democracy and Development* 243 at 245. Wandrag highlights that in 1999, 843 municipalities were facing financial difficulties. Also see Roos R & Stander L "Insolvent municipalities? An analysis of the debt relief mechanisms at the disposal of municipalities and the disappearance of the 'advantage of the creditor'" (2007) 22 *South African Public Law* 166 at 166.

³ Greffrath W & van der Walt G "Section 139 Interventions in South African Local Government, 1994-2015" available at https://www.researchgate.net/publication/310334863_Section_139_Interventions_in_South_African_Local_Government_1994-2015 and Stoddard E "Municipal IQ data shows lockdowns stifled SA social unrest this year – but 2020 is not over yet" (2020) *Daily Maverick* available at <https://www.dailymaverick.co.za/article/2020-08-24-municipal-iq-data-shows-lockdowns-stifled-sa-social-unrest-this-year-but-2020-is-not-over-yet/> (accessed 20 November 2020).

⁴ See AGSA "MFMA 2018/19 local government audit outcomes" (2020) 17 available at <https://www.agsa.co.za/Portals/0/Reports/MFMA/201819/GR/MFMA%20GR%202018-19%20Final%20View.pdf> (accessed 21 October 2020) read with Morais S "Municipalities owed Eskom

legal remedies are available, and to whom, when a municipality faces financial distress, from whatever cause.

Previous research has been done globally on municipalities in financial distress with the objective of determining what the possible causes thereof can be and how to detect them.⁵ Some provided background on the development of municipalities in respect of their financial viability, where the history of non-payment for services is highlighted, and an analysis of municipal income is provided.⁶ Other studies focused on whether the internal controls in municipal financial management influence governance in municipal entities and whether the subsequent audit findings of the Auditor-General have any effect.⁷

Poor oversight of municipalities, external or internal, as underlying reasons for poor performance, have also been documented.⁸ However the question why these problems are so widespread, and why interventions to date have been ineffective in remedying the situation remains unanswered.⁹ These studies have either focused on proactive financial governance or the causes of financial mismanagement, leaving space for research into what could be done when a municipality already finds itself in financial distress.¹⁰

Roos and Stander¹¹ have conducted some research into the debt relief measures available to municipalities in financial distress with a focus on the measures in place to protect creditors. Their study further elaborated on the possibility of sequestrating or liquidating a municipality.¹² Other studies analysed provincial interventions as

R9bn last year -10 statistics that show how they wasted your money" (2019) *News24* available at <https://www.news24.com/Analysis/analysis-municipalities-owed-eskom-r91bn-last-year-10-statistics-that-show-how-they-wasted-your-money-20190626> (accessed 9 August 2019).

⁵ See Watson DJ, Handley DM & Hassett WL "Financial distress and municipal bankruptcy: the case of Prichard, Alabama" 2015 *Journal of Public Budgeting, Accounting & Management* 129 at 131; Cohen S, Doumpos M, Neofytou E & Zopounidis C "Assessing financial distress where bankruptcy is not an option: an alternative approach for local municipalities" 2012 *European Journal of Operational Research* 270 at 271 and Garcia-Sanchez *et al* "A new predictor of local financial distress" 2012 *International Journal of Public Administration* 739 at 740.

⁶ Fourie D "Assessment of the financial resources of municipalities" (1998) 1(2) *SAJEMS* 268 at 268 & 271.

⁷ Ncgobo D "Internal controls, governance and audit outcomes" (2017) 9 (5) *African Journal of Public Affairs* 74 at 75.

⁸ Mello MD "Monitoring and evaluation: the missing link in South African municipalities" (2018) *Journal for Transdisciplinary Research in Southern Africa* 1 at 1.

⁹ Roos & Stander (2007) at 166. See also Wandrag (2003) at 244. See also Mathiba G & Lefenya K "Revitalising the role of the Auditor-General under the auspices of the Public Audit Amendment Act 5 of 2018: a quest for public financial accountability" (2019) 54 *Journal of Public Administration* 532 at 532.

¹⁰ Roos & Stander (2007) at 166. See also Wandrag (2003) at 244.

¹¹ Roos & Stander (2007) at 166.

¹² Roos & Stander (2007) at 167.

processes to improve municipal financial health.¹³ Some of these studies conducted some empirical research to gain insights on the implementation of provincial interventions.¹⁴ This research explored the trends and nature of provincial interventions and whether some key steps in the intervention process are complied with by provincial government.¹⁵ However, these studies leave some room for deeper research into the specifics of financial recovery plans and debt restructuring as part of the intervention process, as well as other tools available to help municipalities to regain their financial health. Previous studies have also maintained a focus on provincial governments as role players in addressing municipal financial distress, and there is thus some room to investigate what other role players can do to address municipal financial distress.

The relevant legislation has also been subject to judicial interpretation.¹⁶ Judicial interpretation has taught that some responses to municipal financial distress, such as section 139 of The Constitution of the Republic of South Africa, 1996, (Constitution) must be read within the relevant constitutional framework, such as, local government autonomy, co-operative governance and local community participation.¹⁷

¹³ De Visser J & November J "Overseeing the overseers: assessing compliance with municipal intervention rules in South Africa" (2017) *Hague Journal on the Rule Law* 109 at 110; Ledger T & Rampedi M *Mind the gap: section 139 interventions in theory and in practice* Johannesburg : Public Affairs Research Institute (2019) at 25; Greffrath W & Van der Walt G "Section 139 Interventions in South African Local Government, 1994-2015" available at https://www.researchgate.net/publication/310334863_Section_139_Interventions_in_South_African_Local_Government_1994-2015 at 2 (accessed 20 November 2020); Murray C & Hoffman-Wanderer Y "The National Council of Provinces and provincial intervention in local government" (2007) *Stell LR* 7 at 10. Hoffman-Wanderer Y & Murray C "Suspension and dissolution of municipal councils under section 139 of the Constitution" (2007) *TSAR* 141 at 141.

¹⁴ Greffrath W & Van der Walt G "Section 139 Interventions in South African Local Government, 1994-2015" available at https://www.researchgate.net/publication/310334863_Section_139_Interventions_in_South_African_Local_Government_1994-2015 at 2 (accessed 20 November 2020); Ledger & Rampedi (2019) at 25 and De Visser & November (2017) at 110.

¹⁵ Greffrath W & Van der Walt G "Section 139 Interventions in South African Local Government, 1994-2015" at 2, available at https://www.researchgate.net/publication/310334863_Section_139_Interventions_in_South_African_Local_Government_1994-2015 at 2 (accessed 20 November 2020) ; Ledger & Rampedi (2019)) at 25 and De Visser & November J (2017) at 110.

¹⁶ *Mnquma Local Municipality & another v Premier of the Eastern Cape & others* [2009] ZAECBHC (Mnquma (2009)) 14 and *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo & others* [2014] ZAGPPHC 400.

¹⁷ *Mnquma* (2009) at 40.

2 THE STATUS QUO OF FINANCIAL DISTRESS IN SOUTH AFRICAN MUNICIPALITIES

Previous research, both in South Africa and globally, has considered the causes of municipal financial distress, and some indicators of such problems.¹⁸ It is important to understand that causes and indicators are different things.

Some causes of financial distress are beyond the municipality's control but are within the control of the Parliament. These are often described as unfunded mandates, ie functions which a municipality is required to perform, but for which adequate revenue instruments are not provided. Ultimately, these must be addressed by adjusting the intergovernmental framework to either reduce mandates or increase funding capacity (through transfers or appropriate own-source revenue instruments).

At other times, there are economic shifts¹⁹ that challenge a formerly sustainable municipality, eg when the main employer in a mining town shuts down; This is a transitional challenge, as to which external assistance may be necessary until revenues and expenditure can be brought into alignment. Another topical example one can consider is the current COVID-19 pandemic, which brought with it a number of impacts, one of which was additional financial obligations for municipalities.

Some financial problems are internal to the municipality itself. These include (1) lack of proper financial mismanagement, such as under-collection of revenues or uncontrolled expenditure; and (2) political dysfunction, such as that demonstrated in the City of Tshwane and Nelson Mandela Bay in 2019-2020. Some authors have focused on internal controls related to governance of municipal entities and on the effect of the Auditor- General's audit findings.²⁰ Furthermore, the lack of capacity which leads to poor management is often mentioned.

At the beginning of the democratic era, the history of non-payment for services was highlighted.²¹ That is important, and since we will see that the community is also part of the municipality and responsible for its financial health, we can consider this as an issue within the municipality's control.

Any municipality bears the primary responsibility to identify, avoid, and solve all of its financial problems.²² A municipality includes its political structures, its administrative structures, and its community.²³ Therefore, the political structures,

¹⁸ Watson , Handley & Hassett (2015) at 131. See also Cohen , Doumpos , Neofytou & Zopounidis (2012) at 271 and Garcia-Sanchez *et al* "A new predictor of local financial distress" (2012) *International Journal of Public Administration* 739 at 740.

¹⁹ Watson , Handley & Hassett WL (2005) at 134 and Cahill AG & James JA "Responding to municipal fiscal distress: an emerging issue for state governments in the 1990s" (1992) *Public Administration Review* 88 at 91.

²⁰ Ncgobo (2017) at 75.

²¹ Fourie D (1998) at 268-271.

²² Section 135(1) of the Local Government : Municipal Finance Management Act 56 of 2003.

²³ Section 2 of the Local Government: Municipal Systems Act 32 of 2000.

administrative structures, and the community all share the responsibility to identify, avoid, and solve their municipality's financial distress. While the causes of financial distress can be complicated and varied, the solution inevitably includes bringing revenues and expenditures into alignment. Accordingly, the constitutional and statutory remedies described herein must be applied to achieve that end, even as investigations and interventions to address the underlying causes continue. Money is the lifeblood of any municipality, so the first step must be to stop the bleeding.

The Institute of Directors' *King IV Report on Corporate Governance for South Africa (King IV Report)*²⁴ identifies the municipal council as the governing body of a municipality.²⁵ The municipal council, as a governing body, has primary accountability and responsibility for the governance and performance of the municipality.²⁶ The municipal council is therefore primarily responsible for identifying, avoiding, and solving any municipal financial distress as it arises. The administration and the community also have a role to play, but the council's role is primary. The *King IV Report* states that municipalities do not have shareholders in the traditional sense, but that in several respects the community acts as the shareholders of the municipality.²⁷

The Local Government: Municipal Systems Act 32 of 2000 (Systems Act) provides in section 2(d) that a municipality has a separate legal personality.²⁸ Even though municipalities are juristic persons, they are unique entities and differ from private sector juristic persons in a few fundamental ways. First, private sector juristic persons offer services or goods on a competitive basis; municipalities, on the other hand, generate most of their own-source revenues in a largely monopolistic market (and some services are essential for survival and comfort). A second difference is that most municipal assets cannot be liquidated for the benefit of creditors, either because the assets (roads, sidewalks, parks, landfills, etc) have little market value or because they are necessary for the provision of basic municipal services, and thus protected by law. A third difference is that unlike private sector juristic persons, municipalities have perpetual existence. They cannot be wound down and dissolved, because they are constitutionally mandated instruments of governance and service provision.

Although some municipalities, including metros and secondary cities, are in reasonably good financial shape, the press has raised the alarm about the potential

²⁴ This Report contains principles which should be implemented to achieve good corporate governance. Because municipalities function like businesses as far as generating their own income and being responsible for their own expenditure are concerned, this Report devotes Part 4.6 to municipalities. This section sets out some principles to be applied in assuring that the corporate/business side of municipalities is governed through the use of good corporate governance practices.

²⁵ *King IV Report* at 80.

²⁶ *King IV Report* at 12.

²⁷ *King IV Report* at 80.

²⁸ This section provides that a municipality has separate legal personality which excludes liability on the part of its community for the actions of the municipality.

"collapse" of the municipal sector.²⁹ Ratings Afrika, in its latest municipal financial sustainability index, showed that most of South Africa's municipalities are factually commercially bankrupt, ie their liabilities exceed their assets and they do not have sufficient liquidity to meet their operating costs.³⁰ To help the public identify cases of genuine concern, National Treasury has begun to publish, on its website, a chart that identifies municipalities with serious financial problems.³¹ This chart shows how municipalities stand in terms of the criteria listed in sections 138 and 140 of the Local Government : Municipal Finance Management Act 56 of 2003 (MFMA). The chart reports on which municipalities have issues listed as criteria in sections 138 and 140 of the MFMA, such as, failed to make payments when due, defaulted on financial obligations, submitted their financial statements late to the Auditor-General, etc. In these charts we see that as at June 2020, 200 municipalities had more than R1 million in outstanding debts and are more than 90 days overdue (this is a majority of the municipalities in South Africa), 54 municipalities show an operating deficit of more than 5 per cent of their total direct revenue, and 146 municipalities have problems with their financial statements.³² Unfortunately, these figures have been generally getting worse over time.

The impact of this analysis is thus that factors indicative of a serious financial problem are present in the majority of municipalities. The chart also contains a section which is derived from section 140(2)(c) of the MFMA, which specifies that a failure to timeously pay debts which, in the aggregate, amount to more than 2 per cent of budgeted operating expenditure, is an indicator of serious material breach of financial commitments. At the end of FY 2019/20, 82 municipalities had triggered this section of the MFMA ; this is a minority of municipalities, but still a substantial concern. In such cases, section 139 of the MFMA and section 139(5) of the Constitution both mandate provincial intervention.³³

²⁹ Ryan C "Municipal sector faces collapse – Ratings Afrika" (2019) *Moneyweb* available at <https://www.moneyweb.co.za/news/south-africa/municipal-sector-faces-collapse-ratings-afrika/> (accessed 9 May 2019).

³⁰ Ryan C "Insight: Why municipalities, except in the Western Cape are failing miserably" *Citizen* available at https://citizen.co.za/business/business-news/2338777/insight-why-municipalities-except-in-the-R3LkuoMwestern-cape-are-failing-miserably/?fbclid=IwAzEDacu3FZ_FGInCitjvOmVw6-wKm1Dv7nlaWiUlXNoEpPm2m6U4 (accessed 26 October 2020).

³¹ National Treasury "Municipalities meeting criteria for determining serious financial problems in terms of section 138 & 140 of the MFMA" (2020) available at http://mfma.treasury.gov.za/Media_Releases/s71/1920/4th_1920/Documents/s139%20Targets%20-%20Q4%202019_20%20-%20FY%20and%20Pro%20Rata%20Budget%20v1%20-%20Final%20-%2018%20Sept%202020.xlsx (accessed 16 October 2020). This chart is based on the factors listed in ss 138 and 140 of the MFMA. It indicates whether these factors are present in which municipalities. This chart thus shows whether municipalities are experiencing some factors listed in the MFMA which are indicative of financial distress. We will refer to that chart at various points in this article. It is too large to reproduce here, and we encourage readers to consult it as appropriate.

³² Statistics as at 30 June 2020.

³³ Statistics as at 30 June 2020.

3 FINANCIAL CRISES AND SERIOUS FINANCIAL PROBLEMS

A legal depiction or definition of financial distress in South African municipalities can be found in the MFMA. The MFMA refers to financial problems and financial crises, the latter being the more serious of the two. This part will explain what both these terms entail. The MFMA divides financial distress into two categories: (1) "serious financial problems", as described in MFMA section 138, and (2) "serious or persistent breaches of financial commitments" resulting from a financial crisis, as described in MFMA section 140.

3.1 What is a "serious financial problem" in local government law?

The less acute of the two types of municipal financial distress highlighted in the MFMA is serious financial problems. Although no definition is provided, section 138 of the MFMA sets out criteria for determining "serious financial problems" and provides that the following factors, singly or in combination, may indicate a serious financial problem.

These criteria include the following : the municipality fails to make any payments when due or defaults on financial obligations because of its financial situation; the actual expenses of the municipality exceed its actual income for more than two consecutive financial years; the municipality has a deficit in its operating budget amounting to five per cent of the total revenue in its recent financial year; the municipality is more than 60 days late in submitting its financial documents to the Auditor-General or the Auditor-General withholds its opinion or issues a disclaimer; any of the aforementioned criteria are present in a municipal entity; any other material condition that is indicative that the municipality will be unable to fulfil its obligations due to financial reasons.³⁴

3.2 What constitutes a "financial crisis" in local government law?

The more serious of the two types of financial distress as referred to in the MFMA is a financial crisis. As a starting point, the Constitution in section 139(5) introduces the concept of a financial crisis as a municipality's failure to fulfil its mandate to provide basic services or to fulfil its financial obligations because of its financial situation, or when the municipality admits that it is unable to do so.³⁵

Sections 139 and 140 of the MFMA provide further guidance on what constitutes a "crisis" in a municipality's financial affairs. In section 139(1) the MFMA begins by exactly tracking the wording of the Constitution, section 139(5):

“(1) If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the relevant provincial executive must....”³⁶

³⁴ Section 138 of the MFMA.

³⁵ Section 139(5) of the Constitution.

³⁶ Section 139(1) of the MFMA.

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Like its constitutional counterpart, this subsection goes on to specify what the provincial executive must do. Note that both section 139(5) of the Constitution and section 139(1) of the MFMA are mandatory: the provincial executive *must* act in the circumstances described.

The MFMA, in section 140, then specifies which conditions must be present for a mandatory intervention in terms of section 139. In other words, it sets out the criteria for determining if there is a financial crisis. Section 140(1) provides that "all relevant facts must be considered". Note that both the Constitution and the MFMA speak of *serious* or *persistent* material breaches of a municipality's obligations. Each of these concepts is spelled out in more detail. Concerning a "serious material breach," section 140(2) of the MFMA states that some factors are indicative of a municipality not fulfilling its financial obligations. These factors include the following : the municipality is not paying lenders or investors when due; the municipality does not meet its contractual (those which provide security in terms of section 48) obligations; the municipality does not pay monies when due, which, individually or cumulatively, adds up to more than two per cent of the municipality's current operating expenses budget; the municipality's non-payment has or is likely to have an adverse impact on the availability or price of credit to the local government sector.

As regards a "persistent material breach," section 140(3) of the MFMA adds that this is a continuous or recurring failure of a municipality to pay its debts and that this failure substantially impairs the ability of municipalities to procure goods, services or credit on usual commercial terms.³⁷

To summarise, both section 139 of the Constitution and section 139 of the MFMA speak in terms of a crisis in a municipality's financial affairs which results in a serious or persistent material breach of municipal obligations.³⁸ The "serious or persistent material breach" must be rooted in a financial crisis, but, in theory at least, the crisis can manifest either in service delivery failures ("persistent material breach of its obligations to provide basic services") or in financial failures ("serious or persistent material breach of financial commitments").³⁹ For example, the failure of the Amahlathi Local Municipality (which at the time of writing is subject to a provincial intervention) to pay employees' salaries which amount to 55 per cent of that municipality's expenditure budget would qualify as a serious or persistent material breach of the municipality's financial obligations.⁴⁰

Although a financial crisis can lead to a breach of either financial obligations or service delivery obligations, the emphasis in the MFMA is on financial obligations. This emphasis is logical in an Act that deals with financial management. The burden of

³⁷ Section 140(3) of the MFMA.

³⁸ Wandrag (2003) at 255.

³⁹ Wandrag (2003) at 257.

⁴⁰ Sgqolana T "Council hits day zero" (2019) *Herald* available at <https://www.heraldive.co.za/news/politics/2019-05-27-council-hits-day-zero/> (accessed 9 August 2019).

establishing a breach of a service delivery obligation would usually be harder to meet for the following reasons: as both a legal and a technical matter, establishing exactly what the municipal service delivery obligations are in a specific context is difficult⁴¹, and in addition, establishing the link between a service delivery failure and a financial crisis adds a layer of complexity that may not be necessary.

Since, the MFMA provides little detail, it would also be necessary to navigate a complex maze consisting of the Constitution, the relevant sectoral legislation with its regulations,⁴² and any norms or service delivery standards that the municipality itself may have set, when determining whether a serious or persistent material breach of service delivery is taking place. For example, would a disruption in water service delivery in a posh area of the leafy suburbs, after decades of reliable service provision, be a breach of a service delivery obligation, if it resulted from a re-prioritisation of resources in favour of other areas with less adequate services? It may be said that there are massive problems with service delivery in many municipalities, but it may be difficult to legally establish that a service delivery problem amounts to a serious or persistent breach of the municipality's obligations, and that the breach is due to a crisis in the municipality's financial affairs. Among other things, it may be difficult to obtain the evidence which is required to prove the above.

To further illustrate the difficulty of proving a serious or persistent breach to provide a basic service, consider the following: Bloem Water reduced water pressure, which affected the community of the Mangaung Metropolitan Municipality, as a result of an unpaid debt of R 247 million owed by the Mangaung Metropolitan Municipality.⁴³ In this case, it is not clear that the reduced water pressure would constitute a serious and persistent breach of the municipality's service delivery obligations. In other instances, a breach might be more apparent. The persistent failure of Emfuleni Local Municipality to pay electricity and water bills led to services being reduced or cut. The municipality's deficiencies in maintaining its infrastructure further decreased its ability to provide water and electricity and led to major sewage spills. Moreover, solid waste collection collapsed, and the municipality's entire vehicle fleet was repossessed.⁴⁴

⁴¹ *Mazibuko & others v City of Johannesburg & others* 2010 (3) BCLR 239 (CC) para 40. Municipal service delivery is subject to progressive realisation within their available means, rendering each municipality's service delivery obligations unique. Thus, establishing what the municipal service delivery obligations are in a specific context is difficult.

⁴² Pertaining to the minimum standards of basic service delivery. For example, GN R509 in GG 22355 of 8 June 2001 (Regulations relating to compulsory national standards and measures to conserve water).

⁴³ Morapela K "Mangaung Municipality, Bloem water in court over supply" (2019) *Citizen* available at <https://citizen.co.za/news/south-africa/courts/2155610/mangaung-municipality-bloem-water-in-court-over-supply/> (accessed 9 August 2019). This is also a good example of a breach of a municipal financial obligation.

⁴⁴ Pieterse M "How structural flaws contribute to the crisis in South Africa's municipalities" (2019) *University of Witwatersrand* available at <https://www.wits.ac.za/news/latest-news/in-their-own-words/2018/2018-08/how-structural-flaws-contribute-to-the-crisis-in-south-africas-municipalities.html> (accessed 9 August 2019).

4 RESPONSES PROVIDED IN LEGISLATION SPECIFICALLY FOR A MUNICIPAL FINANCIAL PROBLEM

4.1 How the MFMA deals with financial distress

The MFMA provides clearly that "the primary responsibility to avoid, identify and resolve financial problems in a municipality rests with the municipality itself".⁴⁵ In principle, this is as simple as reducing expenditure to a level that can be met by available revenues, from both own-sources and national transfers. No municipality should be incurring expenditure that it cannot afford, even if it is for a worthy purpose. A poor municipality is one problem, an insolvent municipality is a much worse problem. If a municipality is in over its head, and cannot find its own way back to solvency, then Chapter 13 of the MFMA provides for a process especially formulated to support municipalities in recovering from financial distress. This process consists of provincial interventions with recovery plans and debt restructuring as part of such a process.⁴⁶

Additional legal tools can be found in other legislation to help municipalities recover from financial distress.⁴⁷ In the event of financial distress, the municipality must seek solutions and notify the MECs for Local Government and Finance together with the South African Local Government Association (SALGA).⁴⁸ This co-operation is consistent with the constitutional paradigm of separate spheres of government which are "distinctive, interdependent and interrelated".⁴⁹ The underlying assumption is that, in the ordinary course of things, municipalities can and should manage their financial affairs.

4.1.1 Provincial Interventions

In addition, in the ordinary course of events, the Constitution places a duty on provincial government to monitor and support local government.⁵⁰ Provincial government should provide the necessary oversight to avoid a financial problem turning into a crisis.⁵¹ The Systems Act specifically nominates the MEC for Local Government to bear this monitoring responsibility. The MFMA also places a responsibility on the MEC for Local Government to determine, upon investigation, whether a provincial intervention into municipal affairs is justified in any given set of circumstances.⁵² The MFMA bestows the responsibility for monitoring municipal financial matters on the provincial treasury, which should, in terms of the MFMA, promote sound financial governance and may take appropriate steps against a municipality for non-compliance with the MFMA.⁵³ Provincial government should detect and investigate service delivery issues rooted in

⁴⁵ Section 135(1) of the MFMA.

⁴⁶ Chapter 13 of the MFMA.

⁴⁷ These tools will be discussed in further detail in part 4.2.

⁴⁸ Section 135(3) of the MFMA.

⁴⁹ Section 40 of the Constitution.

⁵⁰ Section 155(6)(a) of the Constitution and De Visser & November (2017) at 133.

⁵¹ Mello (2018) at 1.

⁵² Section 136 of the MFMA and Wandrag (2003) at 260.

⁵³ Sections 2 & 5(4)(d) of the MFMA.

financial distress and must intervene to help solve municipal financial distress in certain instances.⁵⁴

A serious financial problem is already worrisome, and the municipality may well have missed some payments. In such cases, the province has a discretion as to whether or not to intervene and impose a recovery plan. However, when the problem becomes more serious (eg failure to pay a lender or investor, which the MFMA treats more seriously than other payment issues) and/or persistent (eg consistent failure to pay suppliers, which would impair the municipality's ability to procure goods, services or credit on usual commercial terms), then action in accordance with the MFMA is no longer discretionary – it is required. The MFMA provides for discretionary and mandatory provincial interventions.

Different provincial interventions can be instituted, based on the underlying causes for a municipality's financial distress.⁵⁵ The correct diagnosis of the cause of the financial distress is key in determining what intervention should be used, because different grounds for intervention are associated with specific remedies.⁵⁶ In the first instance, an intervention can be instituted when a municipality cannot or does not fulfil an executive or financial obligation.⁵⁷ The second ground justifying a provincial intervention is when a municipality does not adopt a budget or financial instrument in fulfilment of a budget as prescribed by law.⁵⁸ The last instance is when a municipality experiences a financial crisis, rendering it unable to fulfil certain financial obligations or unable to provide basic services.⁵⁹ The first instance is ground for discretionary interventions, whilst the latter two are grounds for mandatory interventions.⁶⁰ The aim of either type of provincial intervention is to provide a comprehensive approach in resolving financial crises in municipalities.⁶¹

For less critical situations the Constitution and the MFMA allow, but do not mandate, provincial intervention. Section 139(1) of the Constitution has been in place since 1996 and has been the basis for the majority of provincial interventions in municipalities to date.⁶² A study done on provincial interventions indicated that between 1998 and 2017, 140 interventions were initiated. Only 11 of these were instituted not using section 139(1) of the Constitution.⁶³ Section 137 of the MFMA is rooted in subsection 139(1) of the Constitution, which provides as follows:

⁵⁴ Section 139(5) of the Constitution as well as ss 136 & 139 of the MFMA.

⁵⁵ De Visser & November (2017) at para 3.2; Ledger & Rampedi (2019) at 17 and *Mnquma* (2009) at para 17.

⁵⁶ Ledger & Rampedi (2019) at 17.

⁵⁷ Section 139(1) of the Constitution and De Visser & November (2017) at 109-133.

⁵⁸ Section 139(4) of the Constitution. See De Visser & November (2017) at 109-133 (para 3.2).

⁵⁹ Section 139(5) of the Constitution and De Visser & November (2017) at 109-133 (para 3.2).

⁶⁰ Sections 139(1), 139(4) & 139(5) of the Constitution.

⁶¹ See Wandrag (2003) at 254.

⁶² De Visser & November (2017) at 109-133.

⁶³ Ledger & Rampedi (2019) at 9.

“(1) When a municipality **cannot or does not fulfil an executive obligation** in terms of the Constitution or legislation, the relevant provincial executive **may** intervene by taking any appropriate steps to ensure fulfilment of that obligation.”⁶⁴

The High Court has indicated that an executive obligation is a fact which must be objectively established.⁶⁵ Executive obligations should not be confused with statutory obligations (even if they are aimed at ensuring effective performance of municipalities).⁶⁶ Failure to fulfil a statutory obligation might not always equate to a failure to fulfil an executive obligation. “Executive” should be understood as enshrined in section 11(3) of the Systems Act, which states how a municipality exercises its legislative or executive authority.⁶⁷ Executive obligations also exclude obligations of municipalities which arise from other sources, such as contracts.⁶⁸

The Constitution provides a choice between three appropriate steps which can be taken by provincial government in the intervention process: the issuing of a directive, assumption of authority, or dissolving the municipal council.⁶⁹ A directive may be viewed as a communication between the provincial executive and the municipality stating what actions should be taken/not taken by the municipality with the aim to recover from financial distress.⁷⁰ Some debate exists about whether a directive is a precondition for the other two more intrusive methods of intervention.⁷¹ Issuing directives can reduce the possibility of lengthy interventions and can achieve acceptable results through the use of less intrusive interventions.⁷² The provincial executive may also assume a municipal responsibility, but the provincial executive may only assume that responsibility which is linked to the unfulfilled obligation of the municipality.⁷³ The Constitution authorises the provincial executive to assume such a responsibility to the extent required to meet established minimum standards for rendering services.⁷⁴

The most extreme intervention is to dissolve the municipal council.⁷⁵ The Constitution, in this case, requires that written notice be given to the Minister and the National Council of Provinces (NCOP).⁷⁶ However, some debate can be observed within

⁶⁴ Section 137 of the MFMA.

⁶⁵ *Mnquma* (2009) at paras 65 & 66.

⁶⁶ *Mnquma* (2009) at paras 65 & 66.

⁶⁷ Section 11(3) of the Systems Act. *Mnquma* (2009) at para 64.

⁶⁸ *Mnquma* (2009) at paras 65 & 66.

⁶⁹ Section 139(1) of the Constitution. De Visser & November (2017) at 109-133.

⁷⁰ De Visser & November (2017) at 109-133. See Wandrag (2003) at 256.

⁷¹ De Visser & November (2017) at 109-133.

⁷² De Visser & November (2017) at 109-133.

⁷³ De Visser & November (2017) at 109-133.

⁷⁴ *Mnquma* (2009) at para 63.

⁷⁵ Section 139(1)(c) of the Constitution; Hoffman-Wanderer & Murray (2007) at 141. See also De Visser & November (2017) at 109-133.

⁷⁶ Section 139(3) of the Constitution.

case law regarding whether the municipal council should be given notice and an opportunity to make representations as to whether it should remain in office.⁷⁷ As already mentioned, it is also unclear whether less intrusive means of intervention should be exhausted before opting to dissolve a municipal council.⁷⁸

For a discretionary intervention per section 137 of the MFMA, the provincial executive is given a wide discretion in terms of what actions may be taken. The MFMA suggests four specific actions: (a) assessing the seriousness of the financial problem; (b) seeking solutions that would be sustainable and would build the municipality's capacity; (c) determining whether to request a financial recovery plan; and (d) consulting the mayor to obtain the municipality's co-operation.⁷⁹ The emphasis on sustainable solutions, on building the municipality's capacity to manage its financial affairs, and the consultation with the mayor are all consistent with the overarching principle that the primary responsibility rests with the municipality itself.

When it comes to a mandatory intervention in terms of section 139 of the MFMA, the province has fewer degrees of freedom. In this case, the Municipal Financial Recovery Service (MFRS), an arm of the National Treasury, must be involved, and it is the MFRS that must assess the situation and determine the reasons for the crisis. A financial recovery plan is mandatory in this case, and it must be prepared by the MFRS rather than by "any suitable person", as would be permitted in a discretionary intervention.⁸⁰ Still, the mayor must be consulted to obtain the municipality's co-operation.⁸¹ The MFRS must determine the cause of the municipality's financial distress and any recommendations for corresponding changes to the budget or revenue raising measures.⁸²

The mayor has an obligation to report any serious financial problems and crises to the MEC for Local Government, thus alerting provincial government to the municipality's financial distress.⁸³ In some cases, provincial governments appear to be reluctant to intervene, even where circumstances warrant mandatory interventions. However, in cases where mandatory interventions are warranted, if the province does not act, then it is possible to approach the judiciary for relief.⁸⁴ The court may then provide a mandamus interdict, ordering the relevant provincial executive to intervene. Whether or not a court may specify what the *appropriate steps* should include in any given intervention is still debated. As a result, interested private parties, such as

⁷⁷ *Mnquma* (2009) at paras 33 and 85.

⁷⁸ *Mnquma* (2009) at para 72 and *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo & others* [2014] ZAGPPHC 400 (*Mogalakwena* (2014)) at paras 17, 18 and 24.

⁷⁹ Section 137 of the MFMA and Wandrag (2003) at 244.

⁸⁰ Wandrag (2003) at 254.

⁸¹ Section 139 of the MFMA.

⁸² Wandrag (2003) at 263.

⁸³ Wandrag (2003) at 262.

⁸⁴ *Mnquma* (2009) at para 99; *Mogalakwena* (2014) at para 80 and *Unemployed Peoples Movement v Premier, Province of the Eastern Cape & others* (553/2019) [2020] ZAECHC 1 at para 84.

creditors, may use complaint processes provided by municipalities to raise their concerns regarding the municipalities' financial distress.⁸⁵ Those with *locus standi* can use the financial emergency provisions in Chapter 13 of the MFMA if the municipality does not react to the concerns raised in the formal complaint. It enables creditors, citizens, employees or others to trigger the processes therein by making the MEC for Local Government in a province "aware that there is a serious financial problem in a municipality".⁸⁶

This position further extends a right to the community to raise concerns regarding a municipality's financial health (through petition and complaint procedures to the municipal administration and political structures)⁸⁷, and where these concerns are not addressed, to approach a competent court for further relief. For example, when Eskom threatened to disrupt the electricity supply to the eMalahleni Local Municipality due to its inability to pay the debt it owed to Eskom, the provincial executive failed to intervene as mandated by the Constitution. Subsequently, the community formed a group called the Save eMalahleni Action Group and sought redress from the High Court. The Save eMalahleni Action Group made legal history, as it was the first community group to compel the provincial executive to undertake an intervention in terms of section 139 of the Constitution.⁸⁸ This case provides a clear illustration of the ability of a community to ensure that municipal financial distress is addressed appropriately.

Chapter 13 of the MFMA structures interventions in such a way as to leave the council in control to the greatest extent possible. Chapter 13 describes a process of rehabilitation, rather than a provincial takeover. The municipality is to be consulted, advised, and eventually circumscribed, but the municipal council remains in power and responsible for resolving financial distress, until and unless the council cannot or does not approve certain legislative measures.⁸⁹

⁸⁵ Section 17(2)(a) of the Systems Act.

⁸⁶ Section 136(1) of the MFMA.

⁸⁷ Section 17(2)(a) of the Systems Act.

⁸⁸ Johan Coetzee Attorneys (legal representatives for the Save eMalahleni Action Group) (2019) available at <https://www.jcat.co.za/NewsResources.aspx?QuickSearch=eMalahleni;https://www.jcat.co.za/Publications/doc15715920181009133204.pdf> and <http://succeedadmin.co.za/Storage/JC/2017/Notification/Eskom/17032017 PDF/9.WHJ Coetzee Supplementary Founding Affidavit.pdf> (accessed 9 August 2019); Goldswain Z "Save eMalahleni makes history" (2018) *Witbank News* available at <https://witbanknews.co.za/115962/save-emalahleni-makes-history/> (accessed 9 August 2019) and Masilela M "Residents can take municipalities to court for non-service delivery" (2018) *SABC News* available at <http://www.sabcnews.com/sabcnews/residents-can-take-municipalities-to-court-for-non-service-delivery/> (accessed 9 August 2019).

⁸⁹ The dissolution of the municipal council and appointment of an administrator can arise in two separate, related ways. In the absence of a recovery plan, the municipal council may be dissolved pursuant to

s 139(4) of the Constitution, if it fails to approve a budget or revenue raising measures necessary to give effect to the budget. If there is a recovery plan, then subsection 139(5)(b) mandates that the

The process of provincial intervention has been and is subject to critique, mostly because municipalities are left in a worse position after the intervention than they were before.⁹⁰ One of the reasons is because, often, when an intervention is instituted the municipality is already, or very close to, complete operational and/or financial collapse.⁹¹ Municipalities provide misleading information to provincial government concerning their financial position, making it more difficult for provincial government to detect financial distress in municipalities.⁹² Another reason identified is the failure to implement legislation (pertaining to interventions) as it was intended, ignoring many provisions or incorrectly applying them.⁹³ Also, there is no prescribed framework providing standard guidelines for administrative practices concerning the implementation of interventions. This results in a set of administrative practices becoming the norm, which does not convey the spirit of the legislation (pertaining to interventions).⁹⁴

Many municipal councils blame political reasons as being behind decisions whether or not to intervene, leaving the provincial intervention process open for political abuse.⁹⁵ To substantiate this point, a trend was observed that the number of interventions increased shortly before local government elections.⁹⁶ Interventions necessarily entail some disruptions in the political status quo of municipalities, and may be vulnerable to neutralise or empower political factions. A fluctuating political climate inevitably increases the political stakes surrounding an intervention.⁹⁷

4.1.2 *Financial recovery plans*

Whether the intervention is discretionary or mandatory, and irrespective of who prepares the financial recovery plan, the process to obtain one and the content of a financial recovery plan are similar for the most part.⁹⁸ There is consultation with the

municipal council must be dissolved if the municipality does not approve a budget or revenue raising measures necessary to give effect to the recovery plan.

⁹⁰ Ledger & Rampedi (2019) at 4.

⁹¹ Ledger & Rampedi (2019) at 8.

⁹² Ledger & Rampedi (2019) at 8.

⁹³ Ledger & Rampedi (2019) at 4.

⁹⁴ Ledger & Rampedi (2019) at 8.

⁹⁵ Ledger & Rampedi (2019) at 9. See also Greffrath W & Van der Walt G "Section 139 Interventions in South African Local Government, 1994-2015" available at <https://www.researchgate.net/publication/310334863> Section 139 Interventions in South African Local Government 1994-2015 at 14 (accessed 20 November 2020).

⁹⁶ Greffrath W & Van der Walt G "Section 139 Interventions in South African Local Government, 1994-2015" available at <https://www.researchgate.net/publication/310334863> Section 139 Interventions in South African Local Government 1994-2015 at 10 (accessed 20 November 2020).

⁹⁷ Greffrath W & Van der Walt G "Section 139 Interventions in South African Local Government, 1994-2015" available at <https://www.researchgate.net/publication/310334863> Section 139 Interventions in South African Local Government 1994-2015 at 14 (accessed 20 November 2020).

⁹⁸ Section 142 of the MFMA.

municipality, with suppliers and creditors, the MECs for Finance and Local Government, and organised local government.⁹⁹ The team preparing the proposed financial plan should submit it to all of the above for comment, and then publish it for comment by the community.¹⁰⁰ The financial recovery plan must identify the particulars of the municipality's financial distress and be designed to put it in a sound and sustainable financial condition as soon as possible. It must include strategic objectives and a strategy for reducing expenses and increasing revenues. It must identify the resources that are needed, describe a timeframe and milestones, and assign responsibility for actions.¹⁰¹ The recovery plan may also provide for the liquidation of non-essential assets, for debt restructuring, for special measures to prevent unauthorised, irregular and fruitless and wasteful expenditures and other losses, and it may identify revenue sources.¹⁰²

Because the primary responsibility for financial recovery still lies with the municipality and the council, even during a mandatory intervention, the recovery plan is intended to interfere as little as possible with the municipal council's ability to set priorities and policies. It does this by setting spending limits and recovery targets,¹⁰³ ie a fiscal envelope within which the council must operate. It provides budget parameters, but not the budget itself. The plan identifies specific and necessary revenue-raising measures, but it does not itself impose those measures – they must be adopted by the council. In the case of discretionary interventions, these same limits, parameters, and measures may be specified, but are not required to be.¹⁰⁴ Furthermore, it can be inferred from the municipality's autonomous nature that nothing prevents the municipality from requesting a financial recovery plan before provincial intervention is triggered. By giving provincial government the competence to intervene in cases of financial distress, the Constitution and the MFMA have not prohibited the municipality from voluntarily engaging in solutions addressing its financial distress. Municipalities may therefore make use of financial recovery plans even when provincial government chooses not to intervene.¹⁰⁵

The implementation of a recovery plan will inevitably involve both the executive and the legislative functions of the municipality. In the case of a mandatory intervention, the municipality must implement the recovery plan, and the plan binds the

⁹⁹ Section 141(3)(a) of the MFMA.

¹⁰⁰ Section 141(3)(c) of the MFMA.

¹⁰¹ Section 142(1)(a) of the MFMA.

¹⁰² Section 142(1)(b) of the MFMA.

¹⁰³ Section 142(2)(a) of the MFMA.

¹⁰⁴ Section 142(2)(b) of the MFMA.

¹⁰⁵ Formulating a financial recovery plan provides municipalities with the opportunity to gain access to people with expertise in, and experience of, solving municipal financial problems. Formulating such a plan is not an admission of a financial crisis which warrants a mandatory intervention. The formulation of a financial recovery plan can take place as a precautionary measure. Therefore, a municipality can request one when it foresees financial problems and crises as envisaged in the MFMA, but before they reach the magnitude justifying an intervention.

municipality to its executive and legislative functions.¹⁰⁶ As regards legislative matters: while any budget and revenue measures must be within the limits of the recovery plan, the council and individual councillors are bound by, or compelled to adopt, such legislative matters, such as taxes, to give effect to the budget. However, councillors are only bound to adopt such measures to the extent required to give effect to the financial recovery plan.¹⁰⁷

It is also important to note that if the conditions for a mandatory intervention in terms of section 139(4) or 139(5) of the Constitution are met and the provincial executive cannot or does not adequately exercise the powers or perform the functions referred to in that section, the national executive must (a) consult the province and (b) act instead of the province.¹⁰⁸

4.1.3 *Debt relief and restructuring*

Part 3 of Chapter 13 of the MFMA provides a quasi-bankruptcy process for municipalities in such dire straits that the restoration of financial health is impossible without some form of debt relief. Debt relief and restructuring can include a stay of legal proceedings against the municipality, a suspension of some of the municipality's financial obligations, or eventually a termination thereof.¹⁰⁹

Section 153(2) of the MFMA determines that for a municipality to receive debt relief in the form of a termination or suspension of financial obligations, some circumstances must be present. The provincial executive must have intervened, and a financial recovery plan will likely fail without some debt restructuring. In addition, the conditions of section 154 or section 155 (depending on the type of debt restructuring sought) must have been complied with.¹¹⁰

Section 154 of the MFMA regulates the suspension of a municipality's financial obligations as a temporary debt relief measure.¹¹¹ The suspension of financial obligations will be granted by a court order only if the court is satisfied that the municipality is unable to meet its current financial obligations and all assets which the municipality does not reasonably need to sustain effective administration or to provide basic municipal services have been or are to be liquidated for the benefit of creditors.

Similarly, section 155 of the MFMA regulates the termination of municipal financial obligations, and this relief measure permanently extinguishes a portion of the debt claim of a creditor.¹¹² A municipality may be granted termination of certain financial obligations if the municipality cannot meet its current financial obligations and it is unlikely that it will be able to do so in the foreseeable future. Also, all assets which are

¹⁰⁶ Sections 145 & 146 of the MFMA. Wandrag (2003) at 263.

¹⁰⁷ Section 146(2) of the MFMA.

¹⁰⁸ Section 150(1) of the MFMA.

¹⁰⁹ Section 153(1) of the MFMA.

¹¹⁰ Section 153(2) of the MFMA.

¹¹¹ Steytler N & De Visser J *South African local government law* 2nd ed Durban : LexisNexis (2018) at 15-53.

¹¹² Steytler & De Visser (2018) at 15-53.

not needed to sustain effective administration or necessary to provide basic municipal services must have been or be about to be liquidated for the benefit of creditors. In addition, municipalities must reduce their staff to include only employees who are affordable in terms of reasonably projected revenue. The liquidation process is to be administered through a distribution scheme (the Insolvency Act 24 of 1936, with the changes as the context may require, determines preference claims)¹¹³ put in place by a trustee overseen by the MEC for Finance.¹¹⁴ For both sections 154 and 155, the municipality must have a financial recovery plan in place.

A municipality may bring its financial situation to the attention of the MEC for Local Government to enable the municipality's access to this quasi-bankruptcy procedure. If the municipality indicates that it faces a financial situation which qualifies as a financial crisis in terms of section 140 of the MFMA, the provincial executive must intervene in accordance with the wording of section 139 of the MFMA and section 139 of the Constitution. If the provincial executive fails to intervene despite the presence of a financial crisis, the municipality will be able to approach the court for an interdict mandating intervention by the provincial executive, together with a request for a financial recovery plan and stay of legal proceedings until the financial recovery plan is in place.¹¹⁵

4.2 Other legislation that may help address financial distress in municipalities

4.2.1 The Public Audit Amendment Act 5 of 2018

The Auditor-General has the mandate to audit and report on the financial statements and management of all municipalities to determine if resources are being procured economically and utilised effectively and efficiently.¹¹⁶ The purpose of the Auditor-General's work is thus to identify cases where public funds are mismanaged. For some years the Auditor-General's powers were limited to routine audits and to the issuing of a report on its findings.¹¹⁷ This limitation on the Auditor-General's powers was extreme and prevented the Auditor-General from influencing the financial management of municipalities. This left the Auditor-General without any competence to address financial problems/crises in municipalities caused by financial mismanagement.

In 2018 these powers were extended by the Public Audit Amendment Act 5 of 2018. The Auditor-General may now conduct special investigations where warranted by public interest or complaints and may then refer identified material irregularities to the relevant public bodies, such as the National Prosecuting Authority.¹¹⁸ In cases of material irregularities, the public body must keep the Auditor-General informed of the

¹¹³ Section 155(3)(c)(ii) of the MFMA.

¹¹⁴ Section 155(2) of the MFMA.

¹¹⁵ Following the judgement given by the High Court to the Save eMalahleni Action Group.

¹¹⁶ Section 188(1)(b) of the Constitution and s 5(1)(aA) of the Public Audit Act 25 of 2004.

¹¹⁷ Section 5(1)(aA) of the Public Audit Act 25 of 2004.

¹¹⁸ Section 5(1)(d) of the Public Audit Act 25 of 2004.

progress and outcome of the public body's investigation.¹¹⁹ In addition, the Auditor-General has the power to take appropriate remedial action.¹²⁰ After an audit has been performed, the Auditor-General may now make recommendations in the audit report regarding remedial action to be taken by the municipality as necessary to ensure that resources are procured economically and utilised effectively and efficiently.¹²¹ The implementation can be subject to a timeframe and the Auditor-General must follow up on the progress of such implementation.¹²² Where the remedial action is prescribed to address a material irregularity and has resulted in a financial loss to the State, the Auditor-General must include a directive in its recommendations.¹²³ This directive must instruct the accounting officer to determine the amount of the loss suffered and then to recover the loss from the responsible person as required in terms of any legislation.¹²⁴ Should the accounting officer fail to comply with this directive, the Auditor-General may recover the determined loss from the accounting officer himself/herself.¹²⁵

For municipalities, the legislation which prescribes the recovery of funds lost to material irregularities is the MFMA. The MFMA sets out in relative detail when a political office-bearer or municipal official will be liable for unauthorised, irregular, fruitless or wasteful expenditure.¹²⁶ It further determines that all unauthorised, irregular, fruitless or wasteful expenditure must be recovered by the municipality from the person liable, unless the municipal council certifies that this expenditure is irrecoverable or written off.¹²⁷ However, if this decision is left exclusively to the municipal council, an opportunity is created for political interference. Section 176(2) of the MFMA also provides that a municipality may recover from the responsible person the loss or damage suffered as a result of intentional or negligent unlawful actions undertaken when performing a function under the MFMA.¹²⁸

Through the use of the word “may” in section 176(2) of the MFMA, the effect of this section is somewhat watered down, there being no obligation on municipalities to

¹¹⁹ Section 5(1A) of the Public Audit Act 25 of 2004.

¹²⁰ Section 5(1B)(a) of the Public Audit Act 25 of 2004. The Material Irregularity Regulations (GN 526 in GG 42368 of 1 April 2019) explain in more detail ss 5A and B of the Public Audit Act 25 of 2004.

¹²¹ Section 5A of the Public Audit Act 25 of 2004.

¹²² The accounting officer is personally charged with overseeing implementation and may be held personally liable for any loss incurred by the State if he/she fails to implement the Auditor General's recommendations relating to material irregularities.

¹²³ Section 5A(2) of the Public Audit Act 25 of 2004. Section 1 of the Public Audit Act 25 of 2004, where a material irregularity is defined as “any non-compliance, or contravention of legislation, fraud, theft or a breach of a fiduciary duty identified during an audit performed that resulted in or is likely to result in a material financial loss, the misuse or loss of a material public resource or substantial harm to a public sector institution or the general public”.

¹²⁴ Section 5A(3) of the Public Audit Act 25 of 2004.

¹²⁵ Section 5B(1) of the Public Audit Act 25 of 2004.

¹²⁶ Section 32(1) of the MFMA.

¹²⁷ Section 32(2) of the MFMA.

¹²⁸ Section 176(2) of the MFMA.

address mismanagement. The extension of the Auditor-General's powers to issue a directive to recover the loss suffered by material irregularities reinforces the above two provisions of the MFMA. When the MFMA and the provisions of the Public Audit Act are read together, it is apparent that the Auditor-General now has the power to give effect to the provisions of the MFMA. Approaching the Auditor-General through a complaint may in this instance be a remedy where a municipality is faced with a financial crisis due to gross financial mismanagement. An example would be the unlawful investment of municipal funds in the VBS bank by municipalities, which resulted in losses for the municipalities as a result of the subsequent looting of VBS bank.¹²⁹ These additional powers given to the Auditor-General equip it to recover funds that were wasted through material irregularities as in the above example. These powers may help provide relief for municipalities in a financial crisis arising from financial mismanagement. The MFMA and the Public Audit Amendment Act are therefore especially relevant in instances where municipalities are in financial distress as a result of gross financial mismanagement and financial misconduct, often in the form of abuse of power and corruption.

4.2.2 *The Disaster Management Act 57 of 2002*

Occasionally, negative externalities, such as disasters, can have a severe impact on municipal financial health.¹³⁰ Disasters can be devastating to municipalities if they are not equipped with adequate resources to respond to the effects of disasters.¹³¹ Municipalities do not only need those resources necessary to mobilise emergency disaster responses, such as emergency housing.¹³² They also require resources (financial, human or infrastructure) to cope with their usual day to day operations and functions, which may have been adversely affected. For example, a disaster may have resulted in a declining population which, in turn, may have decreased the municipality's revenue base.

Globally, municipalities as basic service providers and "first" responders to disasters were at the front line of the COVID-19 pandemic crisis. This pandemic escalated on an unprecedented scale and is still accompanied by major disruptions of municipal budgets.¹³³ The COVID-19 pandemic has tested municipalities' preparedness for disasters internationally, especially since most municipalities are

¹²⁹ Molefe R "VBS: 7 Limpopo Municipalities could be Placed under Administration" (2019) *Mail & Guardian* available at <https://mg.co.za/article/2018-11-15-vbs-7-limpopo-municipalities-could-be-placed-under-administration> (accessed 18 September 2019).

¹³⁰ Watson, Handley & Hassett (2015) at 135.

¹³¹ Watson, Handley & Hassett (2015) at 135. See also Dzigbede KD, Gehl SB & Willoughby K "Disaster resiliency of US local governments: insights to strengthen local response and recovery from the COVID-19 pandemic" (2020) *Public Administration Review* 634 at 635.

¹³² Watson, Handley & Hassett (2015) at 139. See also Dzigbede, Gehl & Willoughby (2020) at 635.

¹³³ Dzigbede, Gehl & Willoughby (2020) at 634.

more proficient in dealing with weather related disasters.¹³⁴ Unlike weather related disasters, other facets increase the complexity of the COVID-19 disaster. COVID-19 crossed borders (effectively impacting almost every municipality/local government on the globe) and has a continuing nature.¹³⁵ In South Africa, municipalities were faced with a number of challenges, including: under lockdown measures taken by national government, municipalities had to function with a reduction of their human resource capacity¹³⁶; municipalities also had to deal with an unexpected decrease in their revenue base,¹³⁷ while having to cope with additional expenses.¹³⁸

The provisions of the Disaster Management Act 57 of 2002 (DMA) may be used for both natural or human induced disasters. The declaration of a disaster may unlock certain essential resources needed to address the effects of a disaster, such as municipal financial distress. When a disaster is declared, the municipality may authorise the release of any resources including skills, and human and monetary resources (for example, the appointment of a specialist in either debt counselling or municipal finance).¹³⁹ It also allows municipalities to do away with certain time-consuming and onerous budgetary, procurement, or other procedures by implementing emergency procurement procedures.¹⁴⁰ To complement these provisions, the MFMA makes provision for emergencies, such as those caused by disasters, in terms of special procurement, budgeting and financial management measures.¹⁴¹ Declaring a disaster can promote the municipality's responsiveness in that decisions can be made and executed much quicker. Declaring a disaster may also be a tool to mobilise support from the Provincial Disaster Management Centre or to gain access to provincial resources.¹⁴² Taking these advantages into consideration, it may be helpful to look to the DMA to provide additional tools when a municipality is faced with a financial crisis, especially if caused by abrupt changes in its economic circumstances (such as those induced by a natural disaster or the collapse of a main industry in a town).

¹³⁴ Dzigbede, Gehl & Willoughby (2020) at 635.

¹³⁵ Dzigbede, Gehl & Willoughby (2020) at 635.

¹³⁶ GN R480 in GG 43258 of 29 April 2020 and GN R 399 in GG 43147 of 25 March 2020.

¹³⁷ Under the strict lockdown measures, the majority of the South African workforce were unable to work, and a substantial number of workers did not receive salaries and wages. Although national government did take steps to compensate the workforce who did not receive salaries and wages, some still did not have enough finances to pay for municipal services. Less human resources also had an adverse impact on the municipalities' ability to effectively collect revenue. GN R480 in GG 43258 of 29 April 2020 and GN R 399 in GG 43147 of 25 March 2020.

¹³⁸ Such as, additional sanitation measures and emergency clean water provision.

¹³⁹ Section 55(2)(a) of the DMA.

¹⁴⁰ Section 55(2)(l) of the DMA.

¹⁴¹ De Visser J & Chigwata T C "Municipal Budgeting and Planning During COVID-19" Dullah Omar Institute 2020 available at <https://dullahomarinstitute.org.za/multilevel-govt/publications/public-participation-and-council-oversight-over-budgets-during-covid.pdf> (accessed on 04 August 2020).

¹⁴² Sections 23 & 30(1)(c), (d), (e) & (f) of the DMA.

Section 1 of the DMA defines “disaster” as

“ a progressive or sudden, widespread or localised, natural or human-caused occurrence which-

(a) causes or threatens to cause-

(i) death, injury or disease;

(ii) damage to property, infrastructure or the environment; or

(iii) significant disruption of the life of a community; and

(b) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources”.¹⁴³

Van Wyk and Boshoff aver that the definition of “disaster” in the DMA is very wide. The only limiting factor is that the occurrence must be of such a magnitude that the municipality cannot cope unless resources beyond its own are acquired.¹⁴⁴ Uys expands on this explanation and believes that the definition of “disaster” includes deliberate and untoward human-made occurrences.¹⁴⁵ The explanation of this definition may imply that even if an occurrence is brought about by incompetence, ignorance, or negligence, it may still be declared a disaster. The use of the word “progressive” in the definition of “disaster” indicates that a disaster may be slow-onset.¹⁴⁶ Therefore, an occurrence may gradually increase in magnitude to a point where the municipality is no longer able to cope with the effects thereof.

A disaster may thus be created and/or exacerbated by a financial crisis (as discussed in part 2.1 above) which results in a serious or persistent material breach of either a municipal financial obligation or a basic municipal service obligation. A financial crisis may be slow-onset, rooted in incompetence or ignorance, and human-made. Severe municipal financial distress has the potential to cause serious disruptions in the lives of members of the community. For example, in *Cape Gate (Pty) Ltd & others v Eskom Holdings SOC Ltd & others* the Emfuleni Local Municipality was unable to meet its financial obligation towards Eskom, and as a result Eskom threatened to suspend bulk electricity supply to the municipality.¹⁴⁷

The suspension of electricity supply can cause a serious disruption in the lives of the community. Similarly, a financial crisis can impair a municipality's ability to maintain essential infrastructure, such as, sewage and sewage treatment works. Illness, injury, and death can result from these instances. In other words, the consequences may be more than just a disruption of everyday life. The factors which are indicative of a financial crisis also indicate that the municipality does not

¹⁴³ Section 1 of the DMA.

¹⁴⁴ Van Wyk J & Boshoff B "The Disaster Management Act 57 of 2002: part panacea or recipe for disaster?" (2003) 18 (2) *SA Public Law* 457 at 462.

¹⁴⁵ Uys F "Disaster management: an overview" (2005) 2 *Journal of Public Administration* 404 at 406.

¹⁴⁶ Uys (2005) at 408.

¹⁴⁷ [2018] ZAGPJHC 599 at para 1.

have the resources (at least the financial resources) to cope with the financial crisis.¹⁴⁸ It may therefore be possible to argue that in certain circumstances a financial crisis may in itself constitute a disaster.

The South African national government declared the COVID-19 pandemic as a disaster in terms of the DMA on 4 March 2020.¹⁴⁹ This unlocked a myriad of responses to the COVID-19 pandemic for local government. Some additional responses of national government included creating an exemption for municipalities from certain procedural financial management actions, such as adopting budgets before the beginning of the next financial year, and authorised municipalities to undertake expenses relating to COVID-19 responses.¹⁵⁰ Municipalities were also authorised to make use of emergency procurement processes and were given permission to continue rendering services despite a strict lockdown.¹⁵¹ Declaring this disaster also prompted national government to provide some guidance to municipalities on their responses to the COVID-19 pandemic, including provision of water and sanitation services, waste management and hygiene education, in the form of regulations or directives.¹⁵² In addition, national government made about R 5 billion available to municipalities for the provision of emergency access to services, such as, water for vulnerable communities and to sanitise public spaces, particularly public transport.¹⁵³ However, providing additional infrastructure, skills or human resources was not part of national government's response package. Municipalities were left to their own devices to come up with and execute solutions to many problems, such as, maintaining effective revenue collection with a much smaller workforce, and adjusting to reduced income caused by residents who could not afford services.¹⁵⁴

South African local government has not been a stranger to corruption, and the already difficult circumstances of COVID-19 was not left untainted by it. Corruption has allegedly been present in many efforts to soften the impact of COVID-19, including the procurement of essential personal protective equipment, emergency

¹⁴⁸ See paragraph 2 above.

¹⁴⁹ GN R243 in GG 43066 of 4 March 2020.

¹⁵⁰ GN R429 in GG 43181 of 30 March 2020.

¹⁵¹ GN R748 in GG 43503 of 30 July 2020.

¹⁵² R 2 of GN R399 in GG 43147 of 25 March 2020.

¹⁵³ National Government 2020 available at <https://www.gov.za/speeches/treasury-coronavirus-covid-19-support-municipalities-12-may-2020-0000#:~:text=National%20government%20has%20made%20available,2019%2F20%20municipal%20financial%20year.&text=4%20billion%20in%20Urban%20Settlements%20Development%20Grant%20allocations%20to%20metropolitan%20municipalities> (accessed 26 October 2020).

¹⁵⁴ National Government 2020 available at <https://www.gov.za/speeches/treasury-coronavirus-covid-19-support-municipalities-12-may-2020-0000#:~:text=National%20government%20has%20made%20available,2019%2F20%20municipal%20financial%20year.&text=4%20billion%20in%20Urban%20Settlements%20Development%20Grant%20allocations%20to%20metropolitan%20municipalities> (accessed 26 October 2020).

water infrastructure provision and relief food parcels.¹⁵⁵ The national government's COVID-19 response relating to empowering and assisting municipalities to effectively address the many impacts this disaster had/has is a missed opportunity, especially since assistance could have been better provided to municipalities by making available, for example, unconditional finances together with strengthened anti-corruption efforts, infrastructure or human resources. The DMA could have been better used in this instance to mobilise resources to support municipalities which are dealing with the temporary effects of, or with the permanent transition to, a different financial position.

5 CONCLUSION

The media provide ample coverage of failing municipalities, sometimes characterising individual municipalities, or even the entire local government sphere, as dysfunctional. Reports of irregular or wasteful local government spending and service delivery protests reinforce the popular perception that many municipalities are in financial crisis. The analysis done by National Treasury provides an indication that this popular perception may very well be true. This focus prompted the authors to consider what legal remedies are available when municipalities face such a financial crisis.

The law does provide legal remedies to address municipal financial distress. However, the worse the financial health of a municipality is before it is addressed, the less likely it is to restore it without intruding extensively on the municipality's autonomy. One of the more popularly used methods to address municipal financial distress is provincial intervention. Provincial interventions have been considered as ineffective for various reasons, including political interference or improper implementation. Financial recovery plans and debt restructuring as part of provincial interventions have not been the subject of elaborate research. The lack of standard guidelines or best practices regarding provincial interventions, debt restructuring and financial recovery plans may be one of the reasons undermining their effectiveness in addressing municipal financial distress.

Some other means to address municipal financial distress can be found in the DMA and the Public Audit Amendment Act 5 of 2018. The Public Audit Amendment Act empowers the Auditor-General to mobilise a process whereby losses due to malicious and gross financial mismanagement can be collected for the benefit of the relevant municipality. The DMA can be used to mobilise necessary resources to support municipalities which are dealing with the temporary effects of, or with the permanent transition to, a different financial position caused by a disaster.

In conclusion, there are legal tools available to leaders who are determined to fix the problems. One should emphasise, however, that political will is necessary to drive

¹⁵⁵ Khumalo T "South Africa's double blow: Corruption and the coronavirus" *DM* available at <https://www.dw.com/en/south-africas-double-blow-corruption-and-the-coronavirus/a-54423065> (accessed 26 October 2020) and Fray P "South Africa the bigger pandemic is corruption" *Good Governance Africa* available at <https://gga.org/south-africa-the-bigger-pandemic-is-corruption/> (accessed 26 October 2020).

these processes. The implementation of these legal tools in any municipality rests on the three pillars that constitute a municipality: the administration, the municipal council, and the community, all of which exist in a broader system of responsive public governance, co-operative government and good intergovernmental relations.

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BIBLIOGRAPHY

Books

Mathenjwa M *Supervision of local government* Cape Town : Juta (2017).

Steytler N & De Visser J *South African local government law* 2nd ed Durban : LexisNexis (2018).

Journal articles

Fourie D "Assessment of the financial resources of municipalities" (1998) 1 (2) *South African Journal of Economic and Management Sciences* 268.

<https://doi.org/10.4102/sajems.v1i2.1880>

Hirsch D "A defense of structural injunctive remedies in South African Law" (2007) 9(1) *Oregon Review of International Law* 1.

Mathiba G & Lefenya K "Revitalising the role of the Auditor-General under the auspices of the Public Audit Amendment Act 5 of 2018: a quest for public financial accountability" (2019) 54(4) *Journal of Public Administration* 532.

Mello MD "Monitoring and evaluation: the missing link in South African municipalities" 2018 *Journal for Transdisciplinary Research in Southern Africa* 1.

<https://doi.org/10.4102/td.v14i1.409>

Ncgobo D "Internal controls, governance and audit outcomes" (2017) 9(5) *African Journal of Public Affairs* 74.

Roos R & Stander L "Insolvent municipalities? An analysis of the debt relief mechanisms at the disposal of municipalities and the disappearance of the 'advantage of the creditor'" (2007) 22 *SA Public Law* 166.

Van Wyk J & Boshoff B "The Disaster Management Act 57 of 2002: part panacea or recipe for disaster?" (2003) 18 (2) *SA Public Law* 457.

Uys F "Disaster management: an overview" (2005) 2 *Journal of Public Administration* 404.

MUNICIPALITIES IN FINANCIAL DISTRESS

Wandrag R "The quest for financial discipline at local government level: the regulation of municipal borrowing and financial emergencies" 2003 *Law, Democracy and Development* 243.

Legislation

Constitution of the Republic of South Africa, 1996.

Disaster Management Act 57 of 2002.

Local Government: Municipal Finance Management Act 56 of 2003.

Local Government: Municipal Systems Act 32 of 2000.

Public Audit Act 25 of 2004.

Public Protector Act 23 of 1994.

South African Human Rights Commission Act 40 of 2013.

State Liability Act 20 of 1957.

Material Irregularity Regulations (GN 526 in GG 42368 of 1 April 2019).

Case law

Cape Gate (Pty) Ltd & others v Eskom Holdings SOC Ltd & others [2018] ZAGPJHC 599.

Democratic Alliance v South African Broadcasting Corporation Ltd & others 2015 (1) SA 551 (WCC).

Joseph & others v City of Johannesburg & others 2010 (4) SA 55 (CC).

Government of the Republic of South Africa & others v Grootboom & others 2001 (1) SA 46 (CC).

South African Broadcasting Corporation SOC Ltd & others v Democratic Alliance & others 2016 (2) SA 522 (SCA).

Reports

Institute of Directors *King IV Report on Corporate Governance for South Africa*.

Internet sources

AGSA "MFMA 2018 local government audit outcomes" (2019) 26 available at <https://www.agsa.co.za/Portals/0/Reports/MFMA/2019.06.25/MFMA2017-18%20-%20Section%203%20-%20Accountability%20for%20financial%20etc.pdf> (accessed 23 July 2019).

Fray P "South Africa the bigger pandemic is corruption" *Good Governance Africa* available at <https://gga.org/south-africa-the-bigger-pandemic-is-corruption/> (accessed 26 October 2020).

Goldswain Z "Save eMalahleni makes history" (2018) *Witbank News* available at <https://witbanknews.co.za/115962/save-emalahleni-makes-history/> (accessed 9 August 2019).

Johan Coetzee Attorneys (2019) available at <https://www.jcat.co.za/NewsResources.aspx?QuickSearch=eMalahleni> (accessed 9 August 2019).

Khumalo T "South Africa's double blow: Corruption and the coronavirus" *DM* available at <https://www.dw.com/en/south-africas-double-blow-corruption-and-the-coronavirus/a-54423065> (accessed 26 October 2020).

Masilela M "Residents can take municipalities to court for non-service delivery" (2018) *SABC News* available at <http://www.sabcnews.com/sabcnews/residents-can-take-municipalities-to-court-for-non-service-delivery/> (accessed 9 August 2019).

Molefe R "VBS: 7 Limpopo Municipalities could be Placed under Administration" (2019) *Mail & Guardian* available at <https://mg.co.za/article/2018-11-15-vbs-7-limpopo-municipalities-could-be-placed-under-administration> (accessed 18 September 2019).

Morais S "Municipalities owed Eskom R9bn last year-10 statistics that show how they wasted your money" (2019) *News24* available at <https://www.news24.com/Analysis/analysis-municipalities-owed-eskom-r91bn-last-year-10-statistics-that-show-how-they-wasted-your-money-20190626> (accessed 9 August 2019).

Morapela K "Mangaung Municipality, Bloem water in court over supply" (2019) *Citizen* available at <https://citizen.co.za/news/south-africa/courts/2155610/mangaung-municipality-bloem-water-in-court-over-supply/> (accessed 9 August 2019).

Municipal Demarcation Board "MDB capacity assessment" (2019) available at <http://www.demarcation.org.za/site/wp-content/uploads/2019/01/MDB-capacity-assessment-Executive-Summary-FINAL-1.pdf> (accessed 9 August 2019).

National Treasury "Municipalities meeting criteria for determining serious financial problems in terms of section 138 & 140 of the MFMA" (2019) available at [http://mfma.treasury.gov.za/Media Releases/s71/1819/3rd 1819/Pages/pdf.aspx](http://mfma.treasury.gov.za/Media%20Releases/s71/1819/3rd%201819/Pages/pdf.aspx) (accessed 9 August 2019).

Pieterse M "How structural flaws contribute to the crisis in South Africa's municipalities" (2019) *University of Witwatersrand* available at <https://www.wits.ac.za/news/latest-news/in-their-own-words/2018/2018-08/how-structural-flaws-contribute-to-the-crisis-in-south-africas-municipalities.html> (accessed 9 August 2019).

Ryan C "Municipal sector faces collapse – Ratings Afrika" (2019) *Moneyweb* available at <https://www.moneyweb.co.za/news/south-africa/municipal-sector-faces-collapse-ratings-afrika/> (accessed 9 May 2019).

Ryan C "Insight: Why municipalities, except in the Western Cape are failing miserably" *Citizen* available at https://citizen.co.za/business/business-news/2338777/insight-why-municipalities-except-in-the-western-cape-are-failing-miserably/?fbclid=IwAR3LkuoMzEDacu3FZ_FGInCitjvOmVw6-wKm1Dv7nlaWiUlXNoEpPm2m6U4 (accessed 26 October 2020).

MUNICIPALITIES IN FINANCIAL DISTRESS

Sgqolana T "Council hits day zero" (2019) *Herald* available at <https://www.heraldlive.co.za/news/politics/2019-05-27-council-hits-day-zero/> (accessed 9 August 2019).